STATE OF MICHIGAN

COURT OF APPEALS

In re SANTOS, Minors.

UNPUBLISHED
December 18, 2014

No. 320220
Eaton Circuit Court
Family Division
LC No. 13-018437-NA

Before: M. J. KELLY, P.J., and CAVANAGH and METER, JJ.

PER CURIAM.

Respondent A. Cervantes appeals as of right from an order terminating her parental rights to her two children, who were approximately 22 months and five months old, respectively, pursuant to MCL 712A.19b(3)(g) and (j). We affirm.

Respondent's oldest child was taken into custody in January 2013, after she permitted the father to take him. The father, who had a criminal past and pending charges for drug and weapons offenses, was under investigation for suspected physical abuse of the child. Text messages indicated that between the time of the abuse and the time the child was taken into custody, respondent had allowed the father to see the child.

After the child was taken into custody, respondent exercised generous visitation with the child. She also took advantage of, and seemed to benefit from, various services. Although she had expressed hopes that the child's father would progress to a point where they could live together as a family, she ultimately expressed that she did not want to have a continued relationship with the father and wanted his parental rights terminated. Shortly thereafter, the child was returned to her care on August 21, 2013. Six days later, respondent gave birth to her second child, who had the same father.

When the newborn baby was nine days old, respondent took the children to a Motel 6 where the father was staying. Her car had a smell of marijuana, apparently due to her brother's use of the car the previous evening. However, text messages on her cell phone indicated that she had assisted her father and brother with obtaining marijuana. Respondent tested negative for marijuana, but apparently had a medical marijuana card.

Unbeknownst to respondent, when she arrived at the Motel 6, the children's father had just been arrested for crimes related to possession of multiple firearms, marijuana, and methamphetamine. He told a police officer that he had been mixed up with some unsavory people and had recently been shot at, and that some people were trying to kill him. Besides

marijuana and methamphetamine, the police found $8,900, two stolen handguns in a backpack, a shotgun underneath the mattress, and a semi-automatic handgun in his car. Respondent denied that she had intended to stop and see the children's father. The father, however, admitted that he had been using methamphetamine daily for 2½ years, and reported that respondent had let him stay the previous night in her home and allowed him to see the children. Respondent denied these reports, and claimed that she went by the Motel 6 only to confirm that the father was staying there, so that her grandmother could then go there and plead with him for money. However, respondent told a foster care worker that her plan was to leave the children in the car and go up to the motel room door. Respondent stated that she had known about the father's methamphetamine use since November 2012.

The trial court found that, contrary to respondent's testimony, she had contact with the father after the abuse of the older child. The court stated, mistakenly, that a condition after every hearing in the case was that respondent would not have contact with the father and that respondent had affirmed that she would not do so. However, the court also found that respondent knew that the court wanted her to stay away from the father. The court found that respondent's testimony regarding the Motel 6 incident was not credible. It concluded that she knew that the father was at the motel, that she "went there to be with him and took her two children with her" in a car her brother had likely used to transport marijuana, that she knew the father was involved in drugs, that she was still emotionally involved with the father, and that "she put that interest ahead of the interest of her children" and put them at "substantial risk of harm" by taking them to the motel where there were loaded guns, drugs, and large amounts of cash. The trial court noted that respondent had professed that she wanted to sever ties with the father and had agreed to safety plans to protect the children from him, but found that she continued to associate with him behind everyone's back. The court concluded that respondent did not have "the capacity to protect these children," that she had failed to provide proper care and custody by continuing to allow the children to be around their father and around a drug culture, which included "things that she did for her brother," that her current home was not a proper home given her brother's drug use, that she still had housing, economic stability, and dependency or co-dependency issues, and that there was no reasonable expectation that she would be able to provide proper care and custody within a reasonable time. Further, the court found that given the father's drug involvement and the drugs where she was living, there was a reasonable likelihood that the children would be harmed if returned to her home. Moreover, the court found by a preponderance of the evidence that termination of respondent's parental rights was in the children's best interests.

I. FIFTH AMENDMENT ISSUE

Respondent first argues that the trial court violated her Fifth Amendment rights when, after holding that she was entitled to assert the Fifth Amendment in response to petitioner's questions regarding her purchases of Sudafed for the children's father, the court asked similar questions during its examination of respondent. Because respondent did not reassert the Fifth Amendment during the court's questioning, and her attorney did not object when the court asked the questions or when it referenced the testimony in its ruling, this issue is not preserved. Accordingly, our review is for plain error affecting respondent's substantial rights. *People v Carines*, 460 Mich 750, 762-764; 597 NW2d 130 (1999). As our Supreme Court explained in *Carines*:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . . It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error . . . seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence. [*Id.* at 763 (citations and internal quotations omitted).]

A deputy testified that on June 18, 2013, a drug store blocked the children's father from buying 12-hour Sudafed, which is commonly used for methamphetamine manufacturing. Approximately an hour later, respondent went to the same store and bought 12-hour Sudafed. Also, on February 2, 2013, the father and respondent purchased 12-hour Sudafed within approximately three hours of each other at two different stores. After allowing respondent to assert the Fifth Amendment relative to questions aimed at establishing that respondent was purchasing the Sudafed for the children's father so that he could make methamphetamine, the court examined respondent, asking if she wanted the court to believe that she did not know the father was involved in the drug business. She responded that she knew he had an addiction, but not that he was in the business. The court then asked respondent if she bought Sudafed for him and she admitted that she did, explaining that he told her that he did not have the needed identification, but she denied knowing how it was going to be used, although she acknowledged that he did not have a cold. The court subsequently noted respondent's testimony indicating the purchase of Sudafed for him in June 2013 when finding that respondent and the father had contact between the time of the abuse of the older child and the Motel 6 incident, contrary to respondent's testimony (albeit confused) to the contrary.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." In *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993), the Court noted that "[c]hild protective proceedings are not criminal proceedings" and concluded that the Sixth Amendment right of confrontation therefore did not apply. However, in *In re Stricklin*, 148 Mich App 659, 666; 384 NW2d 833 (1986), the Court held that "[t]he privilege against self-incrimination applies to a civil proceeding at which evidence is sought which might subject the witness to criminal prosecution." See also *In re MU*, 264 Mich App 270, 283 n 5; 690 NW2d 495 (2004). Although purchasing Sudafed is not a crime, if respondent was purchasing Sudafed knowing that it would be used in the manufacture of methamphetamine, she could potentially be subject to prosecution as an aider and abettor, MCL 767.39, or to a conspiracy charge. See MCL 750.157a and MCL 333.7401(2)(b)(i). Accordingly, she was entitled to assert the Fifth Amendment with respect to questions where her answers might implicate her in such a conspiracy, or to liability as an aider and abettor. But because she denied knowledge regarding the father's intent for the Sudafed, her testimony could be viewed as exculpatory rather than incriminating. However, an inference of knowledge could be drawn based on her testimony that she purchased the Sudafed for the children's father, knowing that he had an addiction and showed no symptoms of a cold. A lawyer may not call a witness knowing they will claim a Fifth Amendment privilege because this would raise an inference adverse to the

witness in the minds of jurors. See *People v Dyer*, 425 Mich 572; 390 NW2d 645 (1986). It follows that a judge questioning a witness would be precluded from asking questions knowing that a privilege would be invoked. Thus, although respondent could have reasserted the privilege, the questions should not have been asked. The problem, however, was not an inference from invocation of the privilege, but information provided in response to questions that should not have been asked after invocation of the privilege.

That being said, respondent has failed to show that any error affected her substantial rights, because she has not shown that it affected the outcome of the lower court proceedings. Notably, the court did not use the evidence for the proposition that respondent knowingly assisted the father. The court found it significant only in that, coupled with the documents provided regarding the dates that Sudafed was purchased, it strongly suggested that respondent had contact with the father in June 2013, between the December 2012 abuse and September 5, 2013. However, the documents, by themselves, would have given rise to such an inference. Moreover, although respondent claimed at the termination hearing that she had no face-to-face contact with the father during this period, respondent admitted that there had been two to three contacts between December 6, 2013, and late January 2013, and a detective testified that in January 2013 respondent admitted that she had had dinner with the father and had taken the baby to the home of his mother so that he could see the baby. Moreover, on March 29, 2013, a caseworker testified that she had learned through conversations with both the father and respondent that they continued to have contact despite domestic violence concerns. Also, at the adjudication hearing for the younger child, respondent admitted that "despite having knowledge of [the father's] involvement with drugs and weapons and overall criminality that you continued to expose your children and yourself to that culture and him." Finally, the father testified that he was with respondent on the night before his arrest. Thus, while respondent's testimony that she had purchased Sudafed for the father, coupled with the documentation, established that respondent was seeing the father during the period that she claimed she was not seeing him, there was other abundant evidence to establish this fact. Accordingly, that the trial court elicited testimony that was used to establish this fact, after respondent had asserted her Fifth Amendment privilege with respect to essentially the same questions, did not affect respondent's substantial rights.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent next argues that she was deprived of the effective assistance of counsel. "[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999), overruled on other grounds by *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000). Because respondent did not raise an ineffective assistance of counsel claim in a motion for a new trial or request for an evidentiary hearing, our review of this issue is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To establish ineffective assistance of counsel, respondent must show that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and show that the representation so prejudiced her that it denied her a fair proceeding, meaning that there is a reasonable probability that, but for the error, the result would have been different. See *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2001), overruled on other grounds in *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014).

A. FIFTH AMENDMENT

Respondent first argues that counsel should have reasserted respondent's Fifth Amendment privilege against self-incrimination when the trial court asked the questions regarding the purchase of Sudafed. Because the trial court had previously recognized the privilege, it arguably would have been reasonable to again reassert the privilege in response to the trial court's questions. However, it appears counsel had advised respondent to assert the privilege on a question-by-question basis. Moreover, by asserting the privilege, respondent took the risk that the court would draw an inference that she was purchasing Sudafed for the children's father, knowing he intended to use it for methamphetamine production. "In a civil case, a party's invocation of the [Fifth Amendment] privilege against compulsory self-incrimination gives rise to a legitimate inference that the witness was engaged in criminal activity." *Davis v Mut Life Ins Co*, 6 F3d 367, 384 (CA 6, 1993). As noted above, termination proceedings are not criminal proceedings. *In re Brock*, 442 Mich at 108. Rather than risk an inference that respondent knowingly purchased the Sudafed for intended methamphetamine production, counsel might have concluded that it would be better to allow respondent to state that she did not know the intended purpose. This Court "will not second-guess strategic decisions with the benefit of hindsight." *People v Dunigan*, 299 Mich App 579, 590; 831 NW2d 243 (2013). Moreover, respondent has not shown that she was prejudiced by counsel's failure to reassert the privilege. As indicated previously, the trial court relied on the information as support for the fact that respondent had seen the father between December 6, 2012, and September 6, 2013. This fact was independently established by other evidence.

B. FAILURE TO OBJECT TO HEARSAY

A foster care worker testified that, contrary to respondent's representations that she wanted nothing to do with the father, he had heard differently from the father and his sister. He was then asked why he believed there was a concern that respondent would not be able to protect the children when she had said that she did not intend to have a relationship with him. He responded, "Based on the reports of people stating that they've seen [the father] and [respondent] together in the community even with the children having been removed." Respondent argues that this was hearsay and that counsel should have objected because this was the first dispositional hearing for the younger child and hearsay rules therefore applied.

The rules of evidence generally do not apply at a dispositional hearing, MCR 3.973(E), but MCR 3.977(E) provides:

> The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if
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> (1) the original, or amended, petition contains a request for termination;
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> (2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;

> (3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:(a) are true, and
>
> (b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n);
>
> (4) termination of parental rights is in the child's best interests.

Given this rule, the testimony might have been objectionable on hearsay grounds. However, given the abundance of other evidence establishing that respondent had contact with the father, counsel could have determined that nothing would be gained by highlighting this testimony with an objection. Regardless, given respondent's admissions and other evidence on this point, it cannot be said that the admission of this statement was outcome determinative. Thus, respondent was not prejudiced by counsel's failure to object.

C. CPS WORKER OPINION

When asked to explain why she thought it would be in the children's best interests to terminate respondent's parental rights, a child protective services investigator testified:

> Again, we've been doing this for a year. Um, reiterating over and over to [respondent] the dangers that come with the relationship she continues to have with [the father]. She sat up here and acknowledged that he's involved in the criminal behavior that he's in; that he's an addict; the drug history; and, you know, purchasing Sudafed. Um, but yet she can't sever that relationship for the benefit of her children to keep her children in her care. My fear is that if we don't terminate her parental rights I think it's to a point one, uh, [the father] doesn't go to prison for as long as expected or when he gets out she still has that type of relationship with him; that or we see [respondent] perhaps find herself with somebody very similar which is a pattern that professionally I have seen with these types of situations.

Respondent focuses on the statement that respondent might find herself with someone similar. She notes that counsel tried to deflect the statement by establishing that the investigator knew of no such relationship. However, respondent argues that he should have objected because there were no facts or data to support the statement, the investigator was not testifying as an expert, and the statement would not have qualified as expert opinion under MRE 702.

We note that the statement implied that the investigator was speaking with some authority based on her professional experience, but she did not technically offer an opinion by saying something might "perhaps" occur. Moreover, an objection might have invited an attempt to establish a basis for a lay opinion based on the investigator's perception under MRE 701. Declining to object and instead establishing the lack of any such relationship could have been a good strategy. Regardless, there is no evidence that the trial court took this statement into account in deciding this case. Respondent cannot show that it had any effect on the outcome.

III. STATUTORY GROUNDS FOR TERMINATION

Respondent next argues that the trial court mistakenly believed that she was ordered to have no contact with the father and that, absent this misunderstanding, there was not clear and convincing evidence to support the court's conclusion regarding (1) respondent's failure to provide proper care and custody and inability to do so within a reasonable time, and (2) the reasonable likelihood of harm if returned to respondent. A trial court's determination whether statutory grounds for termination were established by clear and convincing evidence is reviewed for clear error. *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). An evidentiary ruling is reviewed for an abuse of discretion. *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009).

The trial court terminated respondent's parental rights under MCL 712A.19b(3)(g) and (j), which permit termination under the following circumstances:

> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
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> * * *
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> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

The petitioner has the burden of establishing a statutory basis for termination by clear and convincing evidence. *In re Trejo*, 462 Mich at 351, 355.

Respondent is correct that the trial court erred in finding that no contact with the father was a condition imposed after every hearing, and that she had affirmed that she would not have such contact. However, respondent nonetheless indicated at the termination hearing that no contact was a condition imposed on her at every hearing. It appears that the safety plans developed called for no contact, but that there was some confusion about whether the no contact applied to respondent or only to the children. However, respondent had obtained a personal protection order against the father in January 2013. Moreover, before her children were returned to her in August 2013, she had indicated that she was renewing this order, that she wanted nothing to do with the father, and that she wanted his parental rights terminated. There was plenty of nonhearsay evidence indicating that there was contact, not the least of which was the father's testimony that he had seen respondent and met the new baby at respondent's home the night before the Motel 6 incident. While the trial court may have been mistaken about whether there were orders in place that precluded respondent from seeing the father, the court's concern was that respondent could not be believed with respect to her assertions that she had severed ties with him. There was no clear error with respect to the trial court's finding that respondent's testimony regarding the Motel 6 incident was not credible, and that she did not have a lapse in judgment and knew that the father was at the motel and "went there to be with him." Given the prior abuse of the older child and the guns and drugs at the motel, placing her children in this

environment deprived them of proper care and custody. Moreover, there was no clear error in the observation that respondent's current home was not a proper home, given her brother's drug use, and that respondent still lacked housing and economic stability, and had dependency or co-dependency issues. Accordingly, especially given the young ages of the children, there was no clear error in the trial court's determination that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time.

For similar reasons, there was no clear error in the trial court's determination that there was a reasonable likelihood that the children would be harmed if returned to respondent's care. Although respondent strives to characterize the Motel 6 incident as a lapse in judgment, there was no abuse of discretion in the court's finding that she went there to be with the father. Given her persistence in seeing him, coupled with the past abuse, there was a reasonable likelihood that the children would be abused if exposed to him and a reasonable likelihood that they would be so exposed.

IV. BEST INTERESTS

Finally, respondent argues that the trial court erred in finding that termination of her parental rights was in the children's best interests. If the court finds that a statutory ground for termination of parental rights is established and that termination of parental rights is in the child's best interest, the court must order termination of parental rights and additional efforts for reunification of the child and parent shall not be made. MCL 712A.19b(5); *In re Beck*, 488 Mich 6, 11; 793 NW2d 562 (2010). Because the rights of the parent and child no longer coincide once a statutory ground is established, and the focus turns to the child, there is a lesser standard of proof and best interests must only be proven by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). In deciding a child's best interests, a court may consider the child's bond to the parent, parenting ability, the child's need for permanency, stability, and finality, the advantages of a foster home over the parent's home, *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012), the parent's history of domestic violence, the parent's compliance with the case service plan, the parent's visitation history, the child's well-being while in care, and the possibility of adoption. *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014). A best interest determination is reviewed for clear error. *In re VanDalen*, 293 Mich App at 139.

The trial court found that respondent's bond with the older child weighed against termination. However, although respondent had many good parenting skills, the court noted that respondent continued to subject the children to people involved in illegal drug use. The baby had been in foster care for most of his life, whereas the older child had spent more than half his life in care. The court noted that he had experienced little permanency, stability, and finality. The court found that respondent's current home was not a good option and that the children were doing well in non-relative foster care. Based on these considerations, and especially respondent's apparent disregard for the threat that the children's father posed to their safety, the

court did not clearly err in finding that a preponderance of the evidence established that termination of parental rights was in the children's best interests.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter